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In the Supreme Court of the United States

OCTOBER TERM, 1971

MIKE TRBOVICH, PETITIONER

v.

UNITED MINE WORKERS OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. 2a-6a) is reported at 51 F.R.D. 270. The judgment of the court of appeals (Pet. App. 1a) is not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on April 27, 1971. The petition for a writ of certiorari was filed on July 23, 1971. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

(1)

QUESTION PRESENTED

Whether a union member has a right to intervene in an action brought by the Secretary of Labor under Section 402 of the Labor-Management Reporting and Disclosure Act of 1959 to set aside a union election.

STATUTE INVOLVED

The Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, pertinently provides:

§ 402, 29 U.S.C. 482:

(a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). * * *

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization * * *.

§ 403, 29 U.S.C. 483:

* * * The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

STATEMENT¹

This action was brought by the Secretary of Labor pursuant to Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 to set aside the election of International officers held by defendant, United Mine Workers of America, in 1969. The challenged election was held on December 9, 1969. The contest for the presidency of the Union became a subject of national notoriety when the defeated candidate, Joseph A. Yablonski, and his wife and daughter were found murdered in their home, early in January 1970. Thereafter, the present petitioner, who had been Yablonski's campaign manager, filed a formal complaint with the Secretary of Labor concerning the conduct of the election.²

After an extensive investigation, the Secretary filed this action, alleging numerous violations of Section 401 of the Act (see Pet. 9-10) in the conduct of the election. The Secretary also sought an injunction to

¹ The facts stated herein are not in dispute and, where no other citations are given, are also stated in the petition.

² Yablonski had invoked his internal remedies by filing a protest with the International Executive Board challenging the conduct of the election. After the deaths of the Yablonski family, the union waived the exhaustion of remedies requirement of Section 402(a) of the Act so that the Secretary could begin his investigation without further delay.

require the union to maintain adequate financial records. A preliminary injunction has been entered, requiring the union to maintain adequate documentation supporting all disbursements, detailed records of financial transactions between the International Union and its districts, and records supporting the reports required under Title II of the Act. Voluminous interrogatories and requests for admissions have been exchanged and answered by the parties, numerous depositions have been taken by both parties, and a trial is scheduled for September 13, 1971.

Petitioner seeks to intervene in this action as the member of the Union whose complaint triggered the Secretary's investigation preceding institution of the lawsuit, and as chairman of the Miners for Democracy (MFD), a dissident group of defendant's members.

Petitioner seeks to add to the Secretary's complaint two additional charges of alleged violation of the Act: (1) the continued maintenance of what petitioner calls "bogus" local unions, composed entirely or primarily of retired members; and (2) the action of defendant's president, Anthony Boyle, as trustee of the United Mine Workers of America Welfare and Retirement Fund, six months before the election, in voting for an increase in the amount of the monthly pension paid to retired bituminous coal miners. As petitioner's motion for intervention shows (see exhibit C3 attached to petitioner's motion for intervention), each of these charges was carefully considered by the Department

of Labor before it was decided that they should not be included in the suit.³

Petitioner's proposed complaint and intervention includes prayers for additional relief stemming from the two charges discussed above,⁴ and also seeks the

³ In brief, the Secretary decided with respect to the first charge that the International Union had consistently interpreted the constitutional provision relied on by the petitioner as precluding the formation of local unions having fewer than ten active members, but not as requiring a local union to be disbanded if at any time thereafter it had fewer than ten active members; that this interpretation was not unreasonable; and that even if the maintenance of local unions composed primarily of retired members were improper, the result of the election could not have been affected thereby, since retired members concededly had the right to vote, and it made no difference whether these votes were cast through pensioner locals or at polling facilities established by other local unions. With respect to the charge concerning the pension increase, the Secretary concluded that Boyle was only one of three trustees of the Welfare and Retirement Fund, and that the evidence did not warrant a charge of improper collusion with the employer trustee; that Boyle's action in voting for the increase was consistent with his previously announced position in favor of such an increase, and with numerous resolutions introduced at the last United Mine Workers convention in favor of such an increase; that the timing of the increase resulted as much from the fact that this was his first opportunity to take action with respect to pensions as from the fact that an election campaign was in progress; that if action to provide increased or additional benefits for union members were subject to challenge because it took place during an election campaign, collective bargaining could be brought to a virtual standstill when an election was imminent; and that this was not the type of "interference" contemplated by Section 401(e).

⁴ Petitioner seeks an order directing the defendant to disband all local unions which it contends exist in violation of

appointment of a board of monitors to oversee all of defendant's financial affairs, and the establishment of rules, either by the court or by a court-appointed panel, for the conduct of a new election.⁵

ARGUMENT

There is no reason for this Court to review the decision below, which is clearly correct, is supported by the language of the Act and its legislative history, and is in accord with the decisions of the only other court of appeals and all the district courts which have considered the question.

1. The Act provides that the exclusive remedy for the enforcement of Title IV is an action by the Secretary of Labor (29 U.S.C. 483). Upon receipt of a member's complaint filed in accordance with the provisions of Section 402(a), the Secretary is to conduct an investigation and to file a civil action only if he finds probable cause to believe that a violation of the Title has occurred in the conduct of a union election.⁶

the union's constitution, and to transfer their members to other local unions; he also seeks publication of a ruling to the effect that President Boyle breached his fiduciary duty to the union members by voting to increase pensions in order to further his own campaign.

⁵ Petitioner also seeks reasonable attorneys' fees and costs.

⁶ Petitioner incorrectly refers to such finding as a "quasi-judicial" determination (Pet. 5, 35). The finding is not made pursuant to any formal administrative proceeding, and does not result in any directive or order; it leads only to the filing of a complaint with a court, which makes its own findings of fact, conclusions of law and judgment on the basis of the evidence presented to it.

As this Court has repeatedly confirmed, the statutory scheme expresses the plain congressional intent to entrust enforcement of Title IV to the expertise and discretion of the Secretary of Labor. *Calhoon v. Harvey*, 379 U.S. 134, 140; *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 471-473; *Wirtz v. Local Union 125, Laborers' International, Union*, 389 U.S. 477, 482-483. Petitioner seeks, through his intervention, to substitute his judgment for that of the Secretary.

Petitioner does not, and could not, contend that the Act bestows upon him any right to institute a separate action under Title IV. See *Calhoon v. Harvey*, 379 U.S. 134. However, his proposed complaint in intervention seeks to interject into the present case allegations of violations with respect to which the Secretary has not made a finding of probable cause—allegations which he claims a right to bring before the court only because of the fortuitous circumstance that the Secretary has filed a suit charging other violations.

The only other court of appeals decision directly in point is *Stein v. Wirtz*, 366 F. 2d 188 (C.A. 10), certiorari denied, 386 U.S. 996. Indeed, Stein's claim to

⁷ The courts have consistently dismissed actions instituted to compel the Secretary to file suit under Title IV where he has not made the statutory finding of probable cause. *McArthy v. Wirtz*, 65 LRRM 2411, 55 L.C. ¶11,944 (E.D. Missouri); *Morrissey v. Shultz*, 74 LRRM 2679, 62 L.C. ¶10,821 (S.D.N.Y.); *Altman v. Wirtz*, 56 LRRM 2651, 50 L.C. ¶19,211 (D.D.C.); *Katrinic v. Wirtz*, 62 LRRM 2557, 53 L.C. ¶11,289 (D.D.C.); *Wirtz v. Local 30, Operating Engineers*, 54 LRRM 2577, 48 L.C. ¶18,569 (S.D.N.Y.); *DeVito v. Shultz*, 72 LRRM 2682 (D.D.C.).

an interest in the subject of the litigation was far more direct than that of the proposed intervenor in this case. The *Stein* case was brought to set aside a union election for a single office, and the only violation alleged was the union's denial of Stein's right to be a candidate for that office. Several months before the union's next regular election, the Secretary entered into a stipulation for settlement of the case on the basis of the union's agreement to permit Stein to be a candidate in that forthcoming election. Stein, dissatisfied with the settlement, sought to intervene. The court of appeals affirmed the district court's denial of his motion, saying (*id.* at 189):

The Act confers upon the Secretary of Labor the *exclusive* right to bring civil actions against labor organizations for violations of members' rights in union elections and election procedures. 29 U.S.C. §§ 482(b), 483; *Calhoon v. Harvey*, 379 U.S. 134, 85 S. Ct. 292, 13 L. Ed. 2d 190. There being no way for appellant to prosecute this type of action by original suit, he cannot be permitted to do so by intervention, for Rule 24(a)(2) cannot be construed to extend federal jurisdiction. Fed. R. Civ. P. 82; *Bantel v. McGrath*, 10 Cir., 215 F. 2d 297.

The *Stein* case (which was decided after the 1966 amendment to Rule 24(a)(2)) is in accord with numerous district court decisions denying the right of union members to intervene in Title IV actions.

Wirtz v. Local 825, I.U.O.E., 60 LRRM 2092 (D. N.J.);
Wirtz v. Local 1377, I.B.E.W., 288 F. Supp. 914 (N.D. Ohio);
Wirtz v. Local 12, I.U.O.E., 66 LRRM 2080 (C.D. Cal.);

See also *Wirtz v. National Maritime Union*, 409 F. 2d 1340 (C.A. 2).

2. Petitioner's discussion of the legislative history draws an unrealistic and unfounded distinction between the Secretary's exclusive right to initiate Title IV litigation and his claimed right of intervention once such litigation has begun. In fact, the legislative history contains no indication that Congress intended anyone but the Secretary to control the conduct of Title IV litigation. Congress gave individual members the exclusive right to seek enforcement of their Title I rights through the courts, and gave them the right to pursue remedies under Title III either individually or through the Secretary. Under Title IV, Congress reserved to individual members certain pre-election rights of individual action (Section 401(c); see Pet. pp. 7-8), but deliberately, and after thorough consideration, made a suit by the Secretary the exclusive means for the enforcement of post-election Title IV rights. The only "legislative history" cited by petitioner which explicitly suggests that the Secretary's exclusive enforcement rights do not preclude individual intervention in Title IV litigation is the legislative afterthought of one of the sponsors of the Act, made in the context of a highly charged political atmosphere some twelve years after the passage of the Act (Pet. 29).

3. Even apart from the preclusion of petitioner's intervention by the statutory scheme of the Act, he

Shultz v. United Steelworkers of America (District 15), 73 LRRM 2940 (W.D. Pa.); *Shultz v. United Steelworkers of America* (District 19), 74 LRRM 2222 (W.D. Pa).

has not made out a case for intervention as of right under Rule 24(a)(2), Fed. R. Civ. P.⁹ Petitioner's claimed interest in the outcome of the litigation is no greater than that of any other member of the defendant union who might desire to become a candidate in a new election ordered by the court as a result of this action. It is the function of the Secretary under the Act to represent the rights of all members of the union in the electoral process, and to assure them the free exercise of the rights guaranteed in Title IV. To the extent that petitioner claims a special interest as the leader of a particular faction within the union, his rights are not protected by Title IV. As this Court has said, the Act was not designed "merely to protect the right of a union member to run for a particular office in a particular election. * * * Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, *supra*, 389 U.S. at 475; see *Wirtz v. Local Union 125, Laborers' International Union*, *supra*, 389 U.S. at 483.

Petitioner has not only failed to show a legally cognizable interest in the subject of the litigation apart from the interest represented by the Secretary, he has also failed to establish that the Secretary's representation of his interest as a union member is inadequate. Under Rule 24(a)(2), an applicant whose

⁹ While petitioner repeatedly refers to the Secretary's alleged concession that petitioner satisfies all conditions for intervention of right under Rule 24(a)(2), the Secretary is unaware of any such concession.

"interest is adequately represented by existing parties" has no right to intervene. Petitioner has demonstrated only a difference of opinion concerning the best method of handling the litigation, and this is not a sufficient showing of inadequacy of representation. *Stadin v. Union Electric Company*, 309 F. 2d 912, 919 (C.A. 8); *Alleghany Corporation v. Kirby*, 344 F.2d 571, 573 (C.A. 2), certiorari granted, 381 U.S. 933, certiorari dismissed, 384 U.S. 28; *Acuff v. United Papermakers and Paperworkers*, 404 F.2d 169, 171-172 (C.A. 5), certiorari denied, 394 U.S. 987; *Martin v. Kalvar Corp.*, 411 F.2d 552, 553 (C.A. 5).

4. *International Union, U.A.W. v. Scofield*, 382 U.S. 205, does not support petitioner's claim for intervention. In *Scofield*, this Court held that the successful party in a proceeding before the National Labor Relations Board could intervene to protect his victory in an appeal to the court of appeals by the unsuccessful party. The situation there was quite different from that presently before the court. Under the National Labor Relations Act, as this Court noted in *Scofield*, Congress has established a system in which (*id.* at 219):

* * * When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control, but the charging party is accorded formal recognition: he participates in the hearings as a "party"; he may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner, and

may file a petition for reconsideration to a Board order * * *. Of course, if the Board dismisses the complaint, he can obtain review as a person aggrieved * * *.

In *Scofield*, this Court held that to allow a party, which had already participated in the fact-finding procedure to protect his victory on appeal was justified by the intent of Congress in passing the National Labor Relations Act, and that the intervention would not "impair effective discharge" of the Board's duties (382 U.S. at 215) and would save judicial time and energy by preventing a second appeal by the charging party if the Board's decision were reversed (*id.* at 212).

By contrast, under the present Act, there is nothing analogous to an agency adjudicative hearing with the "charging party" as a statutorily recognized party. See *Wirtz v. National Maritime Union, supra*; *Reynolds v. Marlene Industries*, 250 S. Supp. 722 (S.D. N.Y.). Hence, there is no applicability here of this Court's concern in *Scofield* that the successful party in the initial proceedings before the Board could be adversely affected in subsequent proceedings before the Board and reviewing court by the *stare decisis* effect of the decision on the first review.

Moreover, in *Scofield*, the Court pointed out that intervention could not impede or delay resolution of the issues, since the record was completed before the Board prior to the permitted intervention. Here, the

record will not be complete until after the trial, and the trial itself would inevitably be delayed and protracted by the additional issues which petitioner seeks to interject.

In National Labor Relations Board proceedings, as the Court further pointed out in *Scofield*, the unsuccessful party has a statutory right to initiate and participate in review proceedings, and it would be anomalous to deny the successful party the same privilege. Under the present Act, there is no "unsuccessful party." The complaining union member has no right to judicial review of the Secretary's determination that there is no probable cause to believe that violations occurred which warrant the institution of suit to set the election aside;¹⁰ and the union cannot dispute the Secretary's finding that there is such probable cause, but must defend on the basis of the evidence presented to the court.¹¹ The judicial proceeding is entirely *de novo*, and is not a proceeding for review of an administrative determination. And, as previously discussed, Congress, for good reasons,

¹⁰ See cases cited in note 6, *supra*.

¹¹ *Wirtz v. Local 30, Operating Engineers*, 34 F.R.D. 13, 14 (S.D. N.Y.). Petitioner asserts there is "no question" concerning a union officer's right to intervene as a party defendant in a Title IV suit (Pet. 35), citing the only judicial decision upholding such right, *Shultz v. United Steelworkers of America*, 312 F. Supp. 538 (W.D. Pa.). The Secretary in that case opposed

conferred on the Secretary the right to institute such judicial proceedings to enforce the Act, and deliberately withheld that right from individual complainants.

5. We do not discuss in detail petitioner's contentions with respect to the prayer for injunctive relief against defendant's recordkeeping violations. Petitioner does not seek to justify separately his proposed intervention on this count, and the same principles apply. This count is founded on Section 210 of the Act (29 U.S.C. 440), which like Section 402(b) (29 U.S.C. 482 (b)), provides for an action by the Secretary, and not by an individual union member.

the officer's intervention, and has appealed from the decision. Significantly, in the very same case, the same district judge denied a motion to intervene by the complaining member, *Shultz v. United Steelworkers of America*, 74 LRRM 2222 (W.D. Pa.). The decision distinguished between the complainant, who had only the right in common with all other union members to seek the contested office, and the incumbent officer, who stood to lose his job if the election were set aside.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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